OUTER HOUSE, COURT OF SESSION

[2006] CSOH 77

OPINION OF LORD McEWAN

in the Petition of

MOHAMMED ALI MAJEAD

Petitioner;

for

Judicial Review of a Determination of an Immigration Appeal Adjudicator promulgated on 7 February 2002 and on the Immigration Appeal Tribunal dated 13 March 2002 promulgated on 22nd day of that month

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Petitioner: Blair; Drummond Miller, W.S.
Respondent: Carmichael; H Macdiarmid

16 May 2006

[1] The circumstances disclosed in this petition are that the petitioner is an Iraqi national who has sought asylum in the United Kingdom in terms of the Convention relating to the Status of Refugees 1951 (the Refugee Convention).

[2] The petitioner who is now 25 years of age arrived in the United Kingdom in a lorry on 31 July 2000 and claimed asylum. It is apparent that he arrived here after many adventures in Iraq. Much of his trouble has emanated from his association with an uncle who may be a communist sympathiser. It is said that his uncle murdered a

man in Iraq and as a result of that, the relatives of the deceased have targeted the petitioner. These relatives were members of a political group called IMIK.

[3] Many matters are raised in the petition but for the purposes of the hearing before me, only two were of significance. They are narrated in Article 6 of the petition and I quote from that as follows:

> "In February 2000 the petitioner was arrested by IMIK and taken to their local headquarters. He was accused of being a communist. IMIK alleged that his uncle had killed one of their members. He was detained for two days and beaten with cables and wires. A cousin of the petitioner who worked for IMIK as a doctor persuaded them to release him. In April 2000 the petitioner was abducted from his home at night. He was blindfolded and handcuffed. He was taken to open ground and beaten until he fainted. He regained consciousness. He heard his assailants discussing whether to shoot him. The petitioner ran away. Shots were fired after him but he was not hit. The petitioner hid with his grandfather until his grandfather found him an agent to help him flee Iraq. He made his way to Turkey and from there using another agent he made his way to the United Kingdom in a lorry."

[4] The petition goes on to narrate many other matters which at various times were live issues, none of which were argued before me. The case before me ultimately was concentrated only on the events of April 2000 as I will narrate later.

[5] It is important to notice what thereafter was the calendar of relevant events.

[6] On 18 July 2001 a case worker Mr Varley, refused the application for asylum. The reasons for refusal letter is of that date and is No. 6/1 of Process. There is mention of what I call the "April incident" in paragraphs 2 and 9 of that letter. Following this refusal the petitioner appealed to an adjudicator, Mr Ward, and his

decision is dated 7 February 2002. It is No. 6/2 of process. Before the adjudicator, there was no appearance for the Secretary of State for the Home Department as is normal but a solicitor, Mr Rhodes appeared for the then appellant. Paragraph 6 of the adjudicator's report tells me that the appellant led no oral evidence but that Mr Rhodes made oral submissions on his behalf. It is not clear precisely what oral submissions Mr Rhodes made or whether in particular he said anything about the April incident. Paragraph 22 of the adjudicator's reasons tells me that the adjudicator gave some credence to the evidence concerning the incident in February 2000 where the petitioner was beaten. In the following paragraph he deals with the incident in April 2000 and of that he says this:

> "The appellant further claims that in April 2000 five men came to his aunt's house with rifles and arrested him. He claims to have been handcuffed and blindfolded. He claims to have been taken to open ground outside Halabja. He claims to have been beaten with the butt of a rifle and kicked. He claims to have fainted. He claims that when he recovered he heard these five persons talking about shooting him so he ran. They allegedly fired at him and missed."

I pause at this stage to look at the statement of the petitioner which was before the adjudicator. It is to be found in the Home Office bundle of productions (No. 6/5 of process) at page 24 and in particular, at page 25 paragraph 7. There the petitioner is describing in his statement what happened in April. It is not necessary to read all of it but to pick up the last two sentences. It reads as follows 'I fainted. When I recovered I heard them talking about shooting me so I ran. They fired at me but missed. They thought they had hit me and left.

Reverting to the adjudicator's decision at paragraph 24 he said this:

"I did not believe the appellant's version of events. I find it totally implausible that a man who was handcuffed and blindfolded could, after being beaten with rifle butts and fainting, get up whilst handcuffed and blindfolded and run away successfully. I considered this to be a fabrication."

It is really against that paragraph that this whole judicial review is taken.

[7] Thereafter, the petitioner appealed to the Immigration Appeal Tribunal as it then was. A number of matters were raised in his application for leave to appeal. It is No.6/4 of Process. Only one of these is now a live issue before me and it reads as follows:

"(1) It is submitted that the learned adjudicator was wrong to make an adverse credibility finding on the evidence of the applicant's claim of the incident of April 2001. Without probing further the evidence (emphasis mine) the credibility or otherwise of the applicant's claim of persecution lies in the detail i.e. the timing of the day, the terrain, the distance between the applicant and his persecutors and the circumstances of the escape. While it is accepted that the applicant has to establish the claim, it is nevertheless submitted that the applicant cannot anticipate every doubt the adjudicator may have thus it behoves the adjudicator to clarify the issues and give the applicant the opportunity to address those concerned. The learned adjudicator's failure to give the applicant the opportunity to address those concerns renders the determination flawed."

[8] The Immigration Appeal Tribunal's determination is No.6/3 of Process. In rejecting his application and refusing leave to appeal the Tribunal stated *inter alia*:

"The adjudicator's determination states that the applicant did not give oral evidence although he was present. The appeal was determined on papers; the

applicant relying on his filed evidence to date, together with the skeleton argument. The applicant was represented at the hearing by Mr J. Rhodes of Immigration Advisory Service, who with the applicant elected to offer no oral evidence or submissions in the absence of a Home Office presenting officer. If the applicant chooses not to take the opportunity to explain his case in detail by oral evidence or submissions then subject to the Surendran guidelines, that is a matter for him."

The Tribunal concluded finally by saying that the determination had been a careful review of the evidence and background material and was fully reasoned and supported. They rejected the appeal as having any real prospect of success.

[9] When the case appeared before me, only one point was argued and that related only to the question of whether the adjudicator ought to have further probed the evidence about the April incident which he did not accept as credible and indeed, categorised, as I have earlier described, it as a fabrication and as implausible. The petitioner invited me to sustain his second plea in law to a limited extent. He sought declarator that the determination of the Immigration Appeal Tribunal was unlawful *et separatim* unreasonable and that it should be reduced (Petition paragraph 4(a)(ii) and (b)). That would leave the decision of the adjudicator untouched and the matter should be remitted back for reconsideration by the new Asylum and Immigration Tribunal. There was some discussion before me about recent amending legislation and transitional provisions for new cases. A case like this would usually be dealt with as a paper exercise. Both parties accepted that the proper course would be to remit to the new appeal tribunal if the petitioner was successful. I was not asked to look at the recent changes and am content to say no more about it.

[10] I was referred to a number of authorities in the course of the hearing. These are *Duman* 2005 CSOH *149* Lord Brodie; *Koca* v *Secretary of State for the Home Department* 2005 SC 487; *R.* v *Secretary of State ex parte Robinson* [1998] QB 929; *Elabas* 2 July 2004 Lord Reed; *Hassan* v *IAT* 2001 Imm. AR 83; *SSHD* v *Makeshavaram* 2002 EWCA CIV 173; and *Ahmed* v *The Home Department* [1994] Imm. AR 457; *Yani* v *Secretary of State for the Home Department* 2005 SLT 875.

[11] The submissions for the parties may be summarised in this way. Mr Blair appeared for the petitioner. He invited me to sustain his second plea in law to the extent to which I have already indicated and to remit the case back to the Asylum and Immigration Tribunal via the transitional provisions. They would then reconsider the matter. He then narrated how difficulties had arisen in another case where a Lord Ordinary had not taken that course of action. He invited me to follow the course of action he proposed and said it was a matter of agreement with the respondents. He then referred me to the statement of the petitioner which is found in No.6/5 of Process and to which I have already referred. He discussed the various violent incidents in February and April and noted what the case worker Mr Varley had made of them in No. 6/1 of Process. He was critical of a number of passages in the case worker's letter, for example he criticised the use of the expression "further reduces his credibility", pointing out that it was difficult to know from what level that had been reduced. In fairness to Mr Blair, he was unable to attach too much weight to these expressions. He then looked at the adjudicator's decision which is No. 6/2 of Process. There was no appearance for the Home Office and no oral evidence was taken. He pointed out that the adjudicator had believed the February incident in part but not the April incident. Belief of both of these matters was, he said, a core issue in the case. If the adjudicator had believed the April events, it might have had a bearing on what he ultimately

decided. The failure of the adjudicator to test the evidence before him on the April issue was a procedural unfairness. He ought to have asked the solicitor appearing, for a submission on it or himself put it to the then appellant. He pointed out that there was a material omission in the adjudicator's finding. The last sentence of the petitioner's statement has been missed out. That he said was important. Under reference to the case of *Koca* he highlighted the procedural unfairness which arose in that case. *Koca* was represented, but certain points were not put to him in the course of the hearing before the adjudicator. That was held by the Inner House to be a procedural unfairness in the circumstances of that case. He referred me to a number of paragraphs in *Koca* using that case as a guide in the present case. He claimed that the hearing before the adjudicator Mr Ward was unfair. The point on which the appellant now founded was not raised in the case worker's letter, No. 6/1 of Process, it was merely mentioned as narrative and it was not said whether Mr Varley believed it or not. Whether or not the appellant's solicitor felt it necessary to probe the account of the April incident, there was an obligation on the adjudicator to do so.

[12] The adjudicator has said that the April incident was totally implausible. The Court ought to ask why he thought this and if the Court did not agree with him, then the matter had to be clarified. It was perfectly plain that desperate attempts to save his own life in the face of men attempting to shoot him was not implausible, and to so hold might have made a difference to the core issue in the case. Since the February incident alone was not enough to require international protection, it was most important that the April incident be properly dealt with. It should also be noted that the April incident was life threatening unlike the February incident and if a finding of credibility on the April incident was capable of making a difference, then the Court

should grant Judicial Review. By not pressing the point, the adjudicator had reached a flawed decision arrived at by unfair means.

[13] Miss Carmichael for the respondent made four points. Firstly she invited me to look at No.6/4 of Process which was the application for leave before the Immigration Appeal Tribunal. Only paragraph 1 which I have already quoted was in point. That raised quite different matters from the matters now sought to be raised in the present Judicial Review. Before the Tribunal it was suggested that terrain, distance and time of day were important whereas here it was a simple suggestion to save one's own life ought to have been the determining factor. It had never been suggested that the adjudicator misunderstood the evidence before him. She pointed me to the Immigration and Asylum Appeals (Procedure) Rules 2000. Rule 18 provides *inter* alia

> "...(6) The Tribunal shall not be required to consider any grounds other than those included in that application....
>
> ...(7) Leave to appeal shall be granted only where -
>
> (a) the Tribunal is satisfied that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard....".

Noticing that the common law had tempered these rules with the need to take obvious points, she referred me to the cases of *Robinson* and in passing *Elabas*. She emphasised that before this Court, the suggested questioning that the adjudicator should have given was that anyone in the position of the petitioner would run away to save his life and contrasted that with the suggested questions put to the Immigration Appeal Tribunal relating to time, distance and terrain. Accordingly she said the point which is now made was never put in the minds of the Tribunal.

[14] The second argument related entirely to the case of *Koca*. That, she said, was a decision on its own facts and proceeded on concessions made to the reclaimer. In that case, the adjudicator had noted a discrepancy as to whether or not the applicant was a "sympathiser" or a "member" of the organisation concerned. At the hearing, a statement was produced to explain away this discrepancy before the Immigration Appeal Tribunal. Accordingly, both the Lord Ordinary and the Inner House knew what would have been said had the matter been raised by the adjudicator. That has to be contrasted with what happened here. In the present case there was no contradiction on the simple facts of the April incident in contrast to the more complex facts as existed in *Koca*. The present case was merely a decision on the evidence before the adjudicator which did not admit of any contradictions. Counsel also noticed that in *Koca* the Inner House apparently did not like the decision of the adjudicator for other reasons.

[15] Counsel referred me to the case of *Hassan*. In that case the adjudicator who heard the applicant did not believe him. In the present case, why did the adjudicator have to warn him that he found him implausible and then ask him to improve on his own position? The fact that the petitioner had led no evidence before the adjudicator was a matter of his own choice.

[16] She then referred me to the case of *Makeshavaram* and in particular, paragraphs 1 to 5. All of these she maintained were illustrative of how things work before adjudicators and the difficulties which they face. It could not be said that the adjudicator had a duty to have asked more questions. That would be a dangerous door to open. The reasons for refusal letter by the case worker were nothing to the point. The matter had gone beyond that letter which, while not perfect, was quite clear in its conclusions.

[17] Thirdly, Miss Carmichael said that the petitioner had to show that if he had had a chance to give evidence or make submissions, there would have been a different outcome. She referred me to *Ahmed* and in particular, the opinions of Lord McCluskey and Lord Clyde. It was entirely speculation as to whether or not a difference would have been made if certain further questions had been asked. That difficulty was compounded because it could not be known with certainty what the petitioner would have said if the points had been put to him or what submissions his agent might have made.

[18] Finally, Miss Carmichael said that in any event it was entirely open to the adjudicator to hold what was placed before him on the April incident as being implausible. It could not be said that he misunderstood the evidence or that no sensible adjudicator could have held what he held to be implausible. She referred me to *Yani*. The adjudicator was entitled to apply his experience and common sense and to find as he did. The fact that he had missed out a sentence which appears in the petitioner's statement was nothing to the point. It was quite clear that the adjudicator knew that the attackers had fired at the petitioner and missed. The only thing that was important was that he ran away and that finding had been noted although not believed.

[19] What then is to be done in this case where the issue has narrowed to the one point which I have called the "April incident"? Although the remedy sought is against the Immigration Appeal Tribunal, inevitably the main thrust of the argument concerned the determination of the adjudicator Mr Ward. From what is contained in the reasons for refusal letter given under the hand of the caseworker (Mr Varley) (No. 6/1 of Process) it must have been apparent to the Petitioner and his legal advisors that the April incident was very important. The original claim for asylum had also many other points argued and most of it had not been found to be credible. Plainly this

should have alerted the Petitioner and his advisors to the significance of credibility on all matters including the April incident.

[20] Returning to that for a moment it is quite clear that the events took place (if they did) in a far away country. Only the Petitioner could give evidence about them. It would be unusual to find anyone to corroborate or refute his account. The Secretary of State could have no knowledge of them. The Petitioner was given a proper opportunity to put the facts forward. The *onus* was on him. He had to hope he would be believed on this and all the other matters.

[21] It is useful to consider what is the task of the adjudicator. Usually he will have to consider many points in a case. It will be a rare case where there is only one issue under the Convention or one issue of fact. That was the case here where the Petition shows that many matters of fact and law were looked at. Also, like any tribunal of fact the adjudicator will have to make his findings of fact and judgement on credibility against the whole evidence and the probabilities, likelihoods and certainties arising, together with any concessions. Credibility can rarely be compartmentalised.

[22] Before considering whether, and if so, how, an adjudicator should independently test a case I want to look further at the authorities on his general duties and to deal with the "implausibility" argument. The case of *Makeshavaram cit sup* is important. Paragraphs 1-6 outline the many matters commonly seen by adjudicators in endeavouring to conduct a fair hearing. It is only necessary to narrate some of these. Each case will depend on its own facts. An adjudicator ought to be cautious about intervening. It will not be the usual case for an adjudicator to test inconsistencies with an applicant especially if he is represented. Reservation of a determination will be normal. In my opinion these extracts are useful and assist the determination of the present case. No authority was cited to me for any general duty on the part of

adjudicators to ask questions of applicants. As Schiemann LJ put it (paragraph 5) "... Usually the tribunal ... will remain silent and see how the case unfolds ...". To much the same effect is *Hassan* v *Immigration Appeal Tribunal cit sup*. Once more the issue was credibility, and the Court of Appeal again stressed that the adjudicator did not have to reason out every item but had to look at the position as a whole. I refer without expanding on it to what was said about it by Buxton LJ at paragraphs 17 and 18. All of this is in my view authority against any general need for an adjudicator to test credibility by questioning. These authorities present a remarkably consistent body of law on the point now before me.

[23] However, the case of *Koca* v *Secretary of State for the Home Department cit sup* was much relied on by the Petitioner. It is thus necessary to see what was actually decided in that case. There was more than one point decided, as there were issues of fairness, expert evidence and general reasoning involved. It will assist to consider what happened before the Lord Ordinary (Carloway) who refused judicial review. His unreported decision is dated 22 November 2002; and I look at it only on the unfairness point. As it developed before him the point was whether the adjudicator ought to have put discrepancies to the applicant about the extent of his involvement with a political party called HADEP (Peoples Democratic Party). No less than five different documents were produced about his alleged affiliation which was described at first as a "sympathiser" (statement of evidence form (S.E.F.)) of one party, and secondly at interview as a sympathiser with HADEP. The caseworker refused his application and on appeal to the adjudicator a third document called a witness statement said he was a "member" of HADEP, and an activist. Having failed on various grounds before the adjudicator he then went to the Immigration Appeal Tribunal. Then a fourth document was lodged called a supplementary witness

statement. This did not deal with the credibility problem. Finally to the Lord Ordinary a fifth document was produced on the point.

[24] Thus far it can be seen that *Koca* is wholly different from the present case where only one simple account exists of events in the "April incident". The Lord Ordinary refused judicial review on this point of fairness and went on to hold in paragraph 37 that even if the adjudicator had looked into the discrepancy problem it had not been shown that it might have influenced his decision (*Ahmed* v *Secretary of State for the Home Department cit sup*).

[25] The First Division took a different view. Only one opinion was given and it is clear that the main reason for allowing the reclaiming motion was in relation to the adjudicator's reasoning or lack of it for rejecting an expert witness and an error made about the production of a report. Comments were also made on the fairness point. It is expressly stated that "... in the particular circumstances of this case ..." the adjudicator ought to have given the applicant a chance to comment on the discrepancy. The opinion goes on to make it clear that there is no general rule of law or practice about this area.

[26] Accordingly *Koca* does not compel me to hold that in the present case Mr Ward ought to have raised the matter of the April incident himself. It is all a question of the circumstances. I now look more closely at what happened and how the matter should be viewed. It is quite clear from the reasons for refusal letter (No. 6/1 of Process) that many matters were considered by the caseworker Mr Varley. It is very plain that he did not overall believe the Petitioner. In argument before me, something was sought to be made by way of criticism of the phrase he used in paragraph 8 of the letter where he wrote that a failure to claim asylum elsewhere "further" reduced his credibility. In my view this is nothing to the point. The use of this adverb has to be

read in the context of the whole letter where many aspects of the Petitioner's evidence are not accepted or are criticised by the caseworker. What is clear on receipt of a letter like this is that credibility in general is in issue.

[27] When one moves to the decision of the adjudicator (No. 6/2 of Process) it is even clearer that on many matters the then appellant was not believed. That is particularly clear in relation to the April incident. That incident, as expressed, consisted of a simple set of facts whether one looks at paragraphs 23-4 or at the Petitioner's statement (No. 6/5) paragraphs 6 and 7. Unlike in *Koca* the adjudicator had no further material before him to make his determination and in my opinion was not entitled or required to probe this matter further. In his own words he found it "implausible" and a "fabrication". In my view that was a conclusion he was entitled to reach bearing in mind that he had to have an overview of this and all the other issues before him.

[28] Something was made of his use of the word "implausible". In my view it is perfectly open to him or any reasonable adjudicator so to describe the events of April. It is sufficient to refer to the decision of Lord Brodie in *Wani* v *Secretary of State for the Home Department cit sup* at paragraph 24 for this proposition. The same phrase is also found without comment in *Hassan* at paragraph 14.

[29] When the appeal went to the Tribunal it was suggested to them that the simple facts of April should have been tested by detailed questions as to time, geography and distance. The Tribunal rejected that as do I. If the adjudicator had done that there would have been the appearance of bias in favour of the respondent who chose (as is normal) not to be represented. Before leaving this point, I want to look at two cases mentioned by Miss Carmichael. She raised them to distinguish them and in my opinion she was right to do so. *Regina* v *Secretary of State etc ex parte Robinson* was

a case involving *inter alia* the availability of internal flight alternative between Jaffna and Colombo. That is a well known point of convention law. It was raised before an adjudicator but not on appeal to the Tribunal who themselves did not raise or consider it. The Court of Appeal were concerned to state, without laying down any detailed guidance, that obvious points of law should be picked up by Tribunals even if not raised in the grounds of appeal, provided they had a strong prospect of success if leave to appeal were granted.

[30] Now in the present case the one point argued is not a point of law but one of fact. However, counsel very fairly drew my attention to *Mutas Elabas, Petitioner cit sup* (Lord Reed). The facts do not matter but in relation to these wider powers of the Tribunal on obvious points of law I was taken to paragraph 21-2 where it was said that the same principles apply to issues of fact not taken on Appeal. Agreeing with a view in an earlier Scottish case Lord Reed at para 23 emphasised the limited nature of the Court's supervisory jurisdiction over the Tribunal.

[31] I respectfully agree with that. Here, of course the point was raised before the Tribunal and rejected. It cannot be said that it raised an issue of fact that "... cried out for an answer..." (*Elabas*, para. 23). In the event I have held that it was not the duty of the Tribunal to test every hypothesis. In the end it was not the point sought to be made to me.

[32] However, the matter does not end there because, before me, this kind of test was not pursued in argument. What Mr Blair said was simply that any desperate attempts to save life could not be said by this Court to be implausible. There are two serious problems about such an argument now as Miss Carmichael pointed out. In the first place I cannot substitute my view for that of the adjudicator. That was the error exposed (paragraph 30) in *Makeshavaram*. Further, that point was never made

before the Tribunal whose decision is now challenged. Under Rule 18(6) the Tribunal can only consider what was before it. That was different to what is before me. I have held that the adjudicator had no duty to put this point and so it cannot be known what the Petitioner would have said if he had been asked about timing, geography and distances. Unsurprisingly then, the Tribunal properly concluded that on this point the appeal had no real prospect of success.

[33] The last of these points remains valid for a further and different reason. As was held in *Ahmed cit sup* in seeking judicial review on the narrow ground now advanced, the Petitioner has to be able to show that if he had had a chance to give evidence or make further submissions there might have been a different outcome. In *Koca*, as I have noted, there were a number of other documents. Here there are none. We cannot know what the Petitioner would have said if he had been asked the now suggested questions, or any other questions. In such a case nothing has been lost by a failure to ask them. For this reason also the argument fails.

[34] In the result judicial review cannot be given here. I will thus sustain the pleas in law for the Respondent and repel those of the Petitioner.